

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

)	
)	
Petitioner,)	Case No. CV-
)	
vs)	
)	<u>ORDER</u> ¹
)	
Respondents.)	

Petitioner has filed an amended petition for writ of habeas corpus relief pursuant to 28 U.S.C. §2254, which contains both exhausted and unexhausted grounds for habeas relief. To exhaust a ground, Petitioner must have “fairly presented” that specific ground to the Supreme Court of Nevada. *See* Picard v. Conner, 404 U.S. 270, 275-76 (1971); Schwartzmiller v. Gardner, 752 F.2d 1341, 1344 (9th Cir. 1984). Petitioner has failed to exhaust grounds _____ in the Amended Petition (#___). A federal court cannot hear a mixed petition that contains both exhausted and unexhausted grounds for habeas corpus relief. *Rose v. Lundy*, 455 U.S. 509, 521–22 (1982); *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir. 1983).

In light of Petitioner’s failure to exhaust state remedies as to all grounds for relief, Petitioner has two options for future proceedings in this case:

(1) Petitioner may dismiss this action and return to state court to exhaust the currently unexhausted grounds for relief without having the merits of the currently exhausted grounds for relief decided, or

(2) Petitioner may proceed with the exhausted grounds by formally and permanently abandoning the unexhausted grounds.

If Petitioner chooses option (1) above, the petition now before this court will be voluntarily dismisses. Petitioner may then proceed through the Nevada state court system in order to exhaust the currently unexhausted grounds. Upon properly exhausting these grounds, Petitioner may seek federal habeas review of all possible grounds for relief. The advantage of this course of action is that it enables petitioner to preserve for review by this Court all known grounds for relief, instead of abandoning some known grounds for relief. Furthermore, a voluntary dismissal of the instant petition would not prejudice in any way Petitioner’s ability to seek federal habeas corpus relief through a subsequent petition.

In the alternative, option (2) above allows Petitioner to proceed on the instant petition. This option, however, requires that Petitioner complete both of the steps set forth below:

First, Petitioner must amend the instant amended petition to delete all unexhausted grounds. Petitioner can satisfy this step by filing a second amended petition from which he has deleted all previously identified unexhausted grounds.

1. Issued in response to motion to dismiss when petition is found to contain unexhausted grounds. Orders petitioner to choose between abandoning the unexhausted grounds or having the action dismissed without prejudice while he returns to state court to complete exhaustion. A form for abandonment is provided.

Second, Petitioner must formally abandon all currently unexhausted grounds for habeas corpus relief stated in the Amended Petition filed _____ (# _____). This formal abandonment shall apply to all such grounds. Petitioner can complete this step by submitting either a sworn, notarized affidavit or a declaration signed under penalty of perjury. This affidavit or declaration must state that Petitioner voluntarily, knowingly, and intelligently agrees to abandon forever the aforementioned unexhausted grounds. In addition, Petitioner's affidavit or declaration of abandonment must also outline the substance of the grounds that are being abandoned and cannot refer to these grounds merely by number. If Petitioner wishes to choose this option, a sample declaration of abandonment is attached hereto as Exhibit A and incorporated herein by reference.

Before deciding to formally abandon these unexhausted grounds, however, Petitioner must understand and carefully consider the consequences of such a choice. By formally abandoning these currently unexhausted grounds, Petitioner would be barred from ever raising these grounds in any federal court. *See McCleskey v. Zant*, 499 U.S. 467 (1991) (grounds intentionally abandoned, as well as those not raised through inexcusable neglect, are subject to being barred by the abuse of the writ doctrine in a subsequent petition); *Rose v. Lundy*, 455 U.S. at 521 (“a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions”); *Neuschafer v. Whitley*, 860 F.2d 1470, 1482 (9th Cir. 1988) (Alarcon, J., concurring) (“If this procedure is followed, the filing of a second petition alleging a new federal constitutional claim will be inexcusable, and an abuse of the writ, unless petitioner is able to allege a change in the law, [or] a newly discovered fact...”); Rule 9(b), Rules Governing Proceedings in the United States District Courts under 28 U.S.C. § 2254 cases.

IT IS THEREFORE **ORDERED** that Petitioner shall have to and including (usually about 20 days) to:

(1) move for a dismissal of the instant Amended Petition pending exhaustion of the current unexhausted grounds; or

(2) file and serve on Respondents a Second Amended Petition deleting all currently unexhausted grounds. Petitioner can only file a Second Amended Petition deleting the unexhausted grounds if Petitioner submits, concurrently with the Second Amended Petition, an affidavit or a declaration in which Petitioner agrees to abandon forever the unexhausted grounds stated in the Amended Petition. Petitioner's affidavit or declaration of abandonment must comply with the requirements set forth in this order.

IT IS FURTHER **ORDERED** that if Petitioner does not respond to this order within the time set forth above, the Clerk of the Court shall promptly resubmit this matter to the undersigned, and the Amended Petition shall then be dismissed as a mixed petition.

Dated this _____ day of _____, 200__.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Petitioner,)	
)	Case No. CV-
)	
vs.)	
)	FORMAL DECLARATION
)	OF ABANDONMENT
Respondents.)	

1. I, _____ (petitioner's name) _____, am the petitioner for habeas corpus relief in the above-captioned case.

2. I have consulted with my Court-appointed attorney as to the various options from which the Court ordered me to choose in its Order filed ____ (# ____). My attorney has explained the options and their consequences to me and I understand this explanation.

3. I understand that by choosing to abandon my constitutional challenge to unexhausted grounds _____, I shall not be permitted to raise this challenge in any federal proceeding. I further understand that Rule 9(b) of the Rules Governing Proceedings in the United States District Courts under 28 U.S.C. § 2254 shall operate to bar me from ever raising this challenge in any federal court, either through appellate review of my instant amended petition or through any possible further petitions.

4. Nevertheless, despite the above consequences, I do hereby voluntarily, knowingly, and intelligently choose to abandon the [insert total number of grounds] unexhausted grounds presented in the Amended Petition, namely that [insert description of grounds to be abandoned].

5. I declare under penalty of perjury that the foregoing is true and correct.

Dated this ____ day of _____, 200__.

(Signature of Petitioner)